Nos. 76-1578, 76-6697

In the Supreme Court of the United States

OCTOBER TERM, 1977

SALVATORE VISCONTI, PETITIONER

v.

UNITED STATES OF AMERICA

VALERIE VISCONTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The judgment orders of the court of appeals (Pet. No. 76-1578 App. 23-25; Pet. No. 76-6697 App. 1) are not reported.

JURISDICTION

The judgments of the court of appeals were entered on March 4, 1977. A petition for rehearing was denied on April 12, 1977. The petitions for a writ of certiorari were

filed on May 9, 1977 (No. 76-6697) and May 11, 1977 (No. 76-1578). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in refusing to remand this case to the district court for an evidentiary hearing on petitioner Salvatore Visconti's claim on appeal that his retained trial counsel was incompetent.

2. Whether the evidence established that federal agents manufactured the interstate elements of the offenses under 18 U.S.C. 1952.

3. Whether an attempt to promote an unlawful activity in violation of state law is punishable under the Travel Act.

4. Whether the government suppressed exculpatory material in violation of *Brady* v. *Maryland*, 373 U.S. 83.

5. Whether the evidence was sufficient to show that petitioners traveled interstate and used interstate facilities to promote an unlawful activity in violation of state law, as proscribed by the Travel Act, 18 U.S.C. 1952.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiracy (Count I) and of utilizing the facilities of interstate commerce to bribe a public official (Count II), in violation of 18 U.S.C. 371 and 1952.[1] Salvatore Visconti was

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[1]At the close of evidence the trial court granted Valerie Visconti's motion for a judgment of acquittal on Count III, charging the use of interstate facilities to bribe a municipal fire inspector (Tr. 1833-1834); Salvatore Visconti was subsequently acquitted of the same charge (Tr. 2100-2101).

Convicted along with petitioners were co-defendants Raphael Bressler and the Adjustment Construction Corporation. Bressler's petition for certiorari, No. 76-5924, was denied on February 22, 1977.

sentenced to five years' imprisonment; Valerie Visconti, Salvatore's daughter, was sentenced to an indeterminate term of incarceration under the Federal Youth Corrections Act, 18 U.S.C. 5010(b) and 5017(c). The court of appeals affirmed.

For several years Salvatore Visconti and co-defendant Bressler regularly bribed public officials in order to gain preferential treatment in the award of government contracts in New York (Tr. 167, 434-436). In 1975, they decided to expand their activities to New Jersey (Tr. 168-169, 336-338). Thereafter, Salvatore Visconti and Bressler met with Neil Piro, the director of the Jersey City Department of Community Development, and offered to make Piro a "ten per cent partner" if he could arrange to award them a $650,000 real estate management contract for city-owned properties in Jersey City; they also offered him five per cent of any fire adjustment contracts that he could assist them in obtaining (Tr. 164-167). Salvatore Visconti said that the partnership would serve as a foundation from which he could expand his activities into other areas of New Jersey. Piro was assured that everything would be done in a manner that would give the appearance of legitimacy and that money could be "funnelled" to him through a corporation or other intermediary (Tr. 167-168).

Following the meeting, Piro contacted federal agents, told them of the bribery attempt, and agreed to assist in electronic monitoring of any future telephone conversations or meetings with Salvatore Visconti and his associates (Tr. 170-171). Petitioners, Bressler, and Piro met or conversed by telephone on several occasions during the next two months, and their conversations were recorded by Piro (Gov't Exs. 89, 93, 96-102, 104-105, 110, 120). In sum, the recorded conversations revealed a multi-million dollar scheme to offer large sums of money to Piro in exchange for preferential treatment in the awarding of gov-

ernment construction contracts (see Tr. 166, 223-225, 242, 245-249, 260, 265, 534, 658, 737-742, 783-789, 802-803). In addition, petitioners sought Piro's assistance in a scheme whereby selective enforcement of the local housing code would be used as a device to extort funds from landlords within Jersey City; this scheme was expected to net a "few hundred thousand dollars" (Tr. 579-582).

ARGUMENT

1. At the conclusion of the trial Salvatore Visconti discharged his trial counsel. Although he was represented by other counsel at his sentencing on April 28, 1976, he nonetheless filed a *pro se* notice of appeal that same day. Subsequently, on August 16, 1976, he retained his present counsel to prosecute his appeal. While the case was pending before the court of appeals, Salvatore Visconti moved the court of appeals to remand the case for an evidentiary hearing on the question of the competency of trial counsel. The motion was denied on March 4, 1977, in light of *United States* v. *Garcia*, 544 F. 2d 681, 684, n. 1 (C.A. 3), where the court stated that it was "preferable to follow the normal procedure" of having ineffective assistance of counsel claims initially presented to the district court. Thereafter, in denying Salvatore Visconti's petition for rehearing, the court of appeals again refused to hold its judgment in abeyance until the incompetency of counsel issue could be considered on limited remand. It concluded (Pet. No. 76-1578 App. 28-29) " * * * that the interest in the finality of direct appeals should be the predominant consideration in cases in which a §2255 review is available in the district court albeit after incarceration * * *."

Petitioner Salvatore Visconti contends that the decision of the court below is in conflict with the procedure employed by the District of Columbia Circuit for disposing of similar claims. In some cases in which an appellant has

raised an ineffective assistance of counsel claim on appeal and the claim cannot be adequately resolved on the existing record, the District of Columbia Circuit has permitted the appellant to file a motion for a new trial with the district court under Fed. R. Crim. P. 33 and, if the district court indicates a disposition to grant the motion, has remanded the case for an evidentiary hearing on the ineffective assistance claim. *United States* v. *DeCoster*, 487 F. 2d 1197, 1204-1205 (C.A. D.C.); see also *United States* v. *Moore*, 529 F. 2d 355 (C.A. D.C.); *United States* v. *Butler*, 504 F. 2d 220 (C.A. D.C.); *United States* v. *Weaver*, 422 F. 2d 711 (C.A. D.C.).

Whether or not the District of Columbia Circuit procedure, permitting a motion for a new trial pending appeal, is consistent with the time requirements of Rule 33, a remand for an evidentiary hearing pending appeal is an "exceptional remedy" that other circuits have not adopted in dealing with claims of ineffective assistance of counsel raised after notice of appeal has been filed. See *United States* v. *Garcia, supra; United States* v. *Huntley*, 535 F. 2d 1400, 1405 (C.A. 5), certiorari denied, No. 76-625, March 21, 1977; *United States* v. *Swallow*, 511 F. 2d 514, 524 (C.A. 10), certiorari denied, 423 U.S. 845. The courts in those cases have followed the normal procedure of deciding appeals as expeditiously as possible on the basis of the existing record and requiring defendants presenting ineffective assistance claims based on evidence outside the record either to file timely Rule 33 motions[2] or to pursue

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[2]Petitioner Salvatore Visconti did file a motion for a new trial, on March 16, 1977, two weeks after the court of appeals entered its judgment in this case (Pet. No. 76-1578 App. 33). That motion was denied two days later, and petitioner has not appealed.

their claims through motions under 28 U.S.C. 2255.[3] The District of Columbia Circuit's procedure is, in any event, based on that court's supervisory power and its view of what procedure may best promote judicial economy; the divergence in procedure among the circuits thereby created does not require the attention of this Court.

Accordingly, there is no occasion to consider the merits of Salvatore Visconti's claims (Pet. 15-18) that his representation at trial was inadequate. The court below did not err in holding that those claims, which rest on matters outside the record, would not be entertained on direct appeal.

2. Petitioner Salvatore Visconti also contends (Pet. 18-19) that his conviction under 18 U.S.C. 1952 cannot stand because the interstate commerce elements of the offense were "manufactured" by federal agents, relying on *United States* v. *Archer*, 486 F. 2d 670 (C.A. 2). That contention is belied by the record, which shows that petitioners and co-defendant Bressler initiated the contact with Piro for the very purpose of expanding their operations into New Jersey and that they thereafter engaged in seven interstate

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[3]It should be noted that the decision below does not in any way deprive petitioner Salvatore Visconti of an opportunity to present his claim in a motion to the district court under 28 U.S.C. 2255. Indeed, as the statute expressly provides, he may file such a motion "at any time," and he could probably obtain a resolution of his claim by such a motion far more expeditiously than by pursuing the matter on direct appeal. *Womack* v. *United States*, 395 F. 2d 630 (C.A.D.C.), which petitioner cites (Pet. 14), does not establish that Section 2255 relief is unavailable pending direct review; indeed it expressly holds that the pendency of direct review is no jurisdictional bar. It merely states that considerations of judicial economy militate against entertaining a Section 2255 motion when direct review may moot the motion. Those considerations do not apply in the context of the Third Circuit's practice with respect to ineffective assistance claims based on evidence outside the record.

telephone calls with Piro and traveled from New York to New Jersey to meet with Piro on six occasions. The fact that after the initial contact Piro decided to cooperate with the FBI hardly constitutes "manufacturing" federal jurisdiction. *Archer* is wholly inapposite. There, federal and state agents devised a fictitious arrest to provide the occasion for corrupting a state prosecutor and themselves traveled to another state to make and receive the phone calls that were asserted as the interstate element.

3. Salvatore Visconti contends (Pet. 19-20) that his interstate activities did not "otherwise promote * * * any unlawful activity" (*i.e.*, "bribery * * * in violation of the laws of the State in which committed") (18 U.S.C. 1952(a)(3) and (b)(2)) because his attempt to bribe Piro was never consummated. At the threshold, this claim fails because, under New Jersey law, "[t]he crime [of bribery] is committed by the mere offer as well as by the actual payment" (*State* v. *Begyn*, 34 N.J. 35, 47, 167 A.2d 161, 167). But, more importantly, the Travel Act proscribes interstate travel or the use of interstate facilities with the intent to promote bribery schemes regardless of whether those schemes are ever successfully consummated through an actual transfer of funds. See *United States* v. *Peskin*, 527 F. 2d 71, 78-79 (C.A. 7), certiorari denied, 429 U.S. 818; *United States* v. *Pomponio*, 511 F. 2d 953, 957 (C.A. 4), certiorari denied, 423 U.S. 874. Thus the government's proof showing Salvatore Visconti's involvement over a two-month period in a scheme to bribe a municipal official was sufficient to support his conviction under 18 U.S.C. 1952, even though no bribe was ever paid to Piro.

4. Petitioner Salvatore Visconti contends (Pet. 20-22) that the government violated *Brady* v. *Maryland*, 373 U.S. 83, when it failed to inform the defense that Piro had been under investigation by the FBI. This claim is insubstantial in light of the record. During the trial the district court was

informed that at some time the witness had been under FBI investigation. The court advised counsel of this fact and directed the government to provide whatever information it had concerning the matter for consideration *in camera*.

In a portion of the record sealed because of its sensitive nature, the court ruled that the material was not disclosable under *Brady* but nonetheless ordered that the material be made available to defense counsel for their review and for use in connection with cross-examination of the witness. Although all defense counsel reviewed the material, it was not used in the cross-examination of the witness. No objection was made to the court's ruling or to the procedure thus employed. Accordingly, the matter is not properly before this Court; see Fed. R. Evid. 103. In any event, the trial court's ruling was correct, since the information was neither suppressed nor was it "material either to guilt or to punishment." *Brady* v. *Maryland*, *supra*, 373 U.S. at 87; *United States* v. *Miller*, 529 F. 2d 1125, 1128-1129 (C.A. 9).[4]

5. Petitioner Valerie Visconti's claim (Pet. 6) that the interstate activity was merely "fortuitous and incidental to the criminal purpose," and thus beyond the scope of 18 U.S.C. 1952, is simply contrary to the record. As indicated above, the evidence showed seven interstate

[4]Petitioner premises his *Brady* claim on the supposition that evidence of the F.B.I. investigation might somehow have been useful in cross-examining Piro. However, under the circumstances of the case, where the evidence against petitioner Salvatore Visconti is strong, Piro's testimony is corroborated by tape recordings of his conversations with petitioner, and defense counsel had the opportunity to cross-examine Piro about the investigation, any *Brady* claim is without merit. See *United States* v. *Esposito*, 523 F. 2d 242, 248-250 (C.A. 7), certiorari denied, 425 U.S. 916.

telephone calls between petitioners and their co-defendant and Piro and six trips to New Jersey in furtherance of the scheme to expand their illegal operations from New York to New Jersey.[5] Indeed, as this Court recognized in *Rewis* v. *United States*, 401 U.S. 808, 811, Section 1952 was specifically directed at individuals who, like petitioner, "reside in one State while operating or managing illegal activities located in another." See also *Erlenbaugh* v. *United States*, 409 U.S. 239, 247, n. 21.[6]

[5]In this connection, petitioner is simply incorrect in stating (Pet. 7) that "[n]o suggestion appears in the record that the conspirators or any of them had engaged in similar unlawful conduct in New York or that the instant offense was the outgrowth, or otherwise related to interstate activities characteristic of organized crime" (see Tr. 167-169, 434-436).

[6]Nor is the decision below in conflict with *United States* v. *Isaacs*, 493 F. 2d 1124, 1146-1149 (C.A. 7), certiorari denied, 417 U.S. 976, and *United States* v. *Altobello*, 442 F. 2d 310, 315 (C.A. 7). Although those cases hold that the "minimal, incidental, and fortuitous" (*Isaacs*, *supra*, 493 F. 2d at 1146) clearance of checks through interstate banking channels is insufficient to meet the federal jurisdictional element (but see *United States* v. *LeFaivre*, 507 F. 2d 1288, 1296-1297 (C.A. 4), certiorari denied, 420 U.S. 1004), the Seventh Circuit in *Isaacs* stated that the appropriateness of a Travel Act prosecution depends on "the nature and degree of interstate activity in furtherance of the state crime" (493 F. 2d at 1148). Thus, the Seventh Circuit has not hesitated to uphold Section 1952 convictions where, as here, interstate travel or the use of interstate facilities was directly and essentially related to promoting an illegal state activity. See *United States* v. *Peskin*, *supra*; *United States* v. *Rauhoff*, 525 F. 2d 1170, 1173-1175 (C.A. 7); *United States* v. *Lee*, 448 F. 2d 604, 606-607 (C.A. 7), certiorari denied, 404 U.S. 858.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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